FILE COPY

No. 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

UNITED STATES OF AMERICA upon the relation and for the use of the TENNESSEE VALLEY AUTHORITY,

Petitioner,

W. V. N. POWELSON, assignee and successor in interest of Southern States Power Company, a Corporation, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT ON REARGUMENT ON POINT I

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IN THE

Supreme Court of the United States

OCTOBER TERM—1942

No. 3

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, *Petitioner*

v.

W. V. N. POWELSON, ASSIGNEE AND SUCCESSOR IN INTEREST OF SOUTHERN STATES POWER COMPANY, A CORPORATION, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT ON REARGUMENT ON POINT 1

In view of the order of the Court that on reargument of the above case the parties will not be limited to Points 2 to 7 inclusive, as listed in petitioner's brief, as first directed, but will also be heard upon Point 1 as set out in that brief, respondent desires to submit for the consideration of the Court one matter relating to Point 1 not heretofore suggested to the Court, namely, the question of whether under the practice and applicable rules Point 1 is properly before this Court for consideration.

As stated in petitioner's brief, Point 1 is "whether just compensation must include an allowance for water power value when any private power development at the site would

have been subject to the plenary control of the United States" (Pet. Br. 2).

In its specification of errors to be urged petitioner states the point in this manner—"The Court below erred * * * 2. In failing to hold that respondent was not entitled to a valuation of his land based upon its potential use as part of a hydro-electric development, because respondent had no private property in the water power inherent in the flow of Hiwassee River" (Pet. Br. 14).

At no time during the trial of this case below did petitioner ask any tribunal to hold "that respondent was not entitled to a valuation of his land based upon its potential use as part of a hydro-electric development, because respondent had no private property in the water power inherent in the flow of the Hiwassee River."

Indeed, it was never suggested by petitioner during the course of the hearings before any of the three tribunals below that respondent did not have the private property right claimed by it in the water power inherent in the flow of the river. Such a contention was apparently never in the mind of any party. The case was tried on a different theory entirely, the respondent contending that the highest and best use of the land condemned, was a part of an integrated 4-dam hydro-electric development, and the petitioner contending that this was not the highest and best use of the property because such use was not commercially feasible or probable and would not have been profitable. All of the testimony on both sides was directed toward proving or disproving the presence of so-called "water power value", in the property. Time and again counsel for petitioner made statements before the Court inconsistent with the theory that respondent did not own private property in the water power inherent in the flow of Hiwassee River.

Judge Johnson, of counsel for petitioner, early in the hearing before the Commissioners, stated:

> "Now it is our contention that they can show the physical characteristics of this property and they can

produce as many witnesses as they see fit to describe it and they can produce as many experts to testify to its adaptability that it is adaptable for power purposes." (Comm. Tr. 168).

A little later Mr. Fowler, counsel for petitioner, said:

"I have always thought that the cost of the land, what he paid for the lands, has a bearing upon the ascertainment of value before this Commission: because they were bought by Mr. Powelson to be used to develop electricity by water power, or so it was understood at the time of the purchase, and being bought for that purpose, the amounts paid tended to establish the market price for the lands in this case—the same lands that he paid money for to use to develop electricity with." (Comm. Tr. 536-537).

Again Judge Johnson said:

"Every use to which the property is adaptable and susceptible may be shown, just as they have been doing here without objection, so far as the property that lies within the area condemned is concerned."

"That is, they can show that as to water, and that by its location, by the various physical characteristics as have been described here by the witnesses and maps, that it is suitable for power purposes, and I think they are entitled to do that. In fact, I know they are under our decisions." (Comm. Tr. 1033).

Again Mr. Fowler stated:

"We have undertaken to deal with an unusual use of property in this very case, that is, development for the generation of electricity, and if that is the basis of value, that is, the best use to which the property is to be put, we would deal with the subject with experts." (Comm. Tr. 4545).

Chairman Mull of the Commissioners stated the problem before the Commissioners as follows:

"It seems that the Commission has already ruled on the matter in that respect. This Commission is not

finding the amount that respondent would be damaged. His damage is not subject to inquiry. The question the Commission is undertaking to find, is the market value of the property that is to be taken. The testimony that is being considered at this time relates to the question as to whether this particular property has a value as a power development, dam site and basin. Now, as to whether the power business is a profitable business or a losing business, this Commission is not particularly concerned.

"If property of that character has a market value, then, what is that market value? Then, what is the market value of this particular power development, if it is one? That is the subject of the Commission's inquiry, and in letting this go in, it may be argued that a single unit has no value as a power development. Then if the respondent shows he has a chain which would give it value, and it thereby has that value; if it has that value, then, it is our business to find it. If it doesn't have it, then, we try to find that, but if it has that value as a prospective power site, not only in its individual unit, but if it has a market value that might be greater for power development than anything else, then, that is the allocation we should give it."

To this statement Judge Johnson replied:

"We seem not to be in a disagreement about that." (Comm. Tr. 1037-1038).

In its brief filed on the hearing of this case before the United States Circuit Court of Appeals (Page 120-121), petitioner summarized its position and contentions. A reading of this summary contains no hint of the contention which petitioner now urges upon this Court as the first point presented for its consideration. It was not until after the opinion of the Circuit Court of Appeals in this case had been rendered that the proposition contained in petitioner's Point 1 seems to have occurred to petitioner. It thereupon filed a petition in the Circuit Court of Appeals for a rehearing, taking the position on the authority of *United*

States v. *Appalachian Electric Power Co.*, 311 U. S. 377, 85 L. E. 243 that any rights of the respondent in what is designated "the water power or dam site value of the property possessed by the respondent" were inferior to the Federal right to develop the property and that compensation for the taking thereof need not be made. The petition to rehear was denied and petitioner thereupon applied to this Court for certiorari, listing Point 1 as one of the grounds upon which the application was made.

It thus appears that Point 1 was not presented at any time during the trials of the case below, was not considered by any of the tribunals which heard the case, and has not been passed on by any of them.

It is the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the Federal Courts, that it considers questions urged by a petitioner or appellant, not presented or passed upon in the Courts below.

Hormel v. *Helvering*, 312 U. S. 552, 85 L. E. 1037;
McGoldrick v. *Compagnie Generale Trans-Atlantique*, 309 U. S. 430, 84 L. E. 849;
Helvering v. *Wood*, 309 U. S. 344, 84 L. E. 796;
Helvering v. *Texas Penn Oil Co.*, 300 U. S. 481, 498, 81 L. E. 755, 766;
United States v. *Atkinson*, 297 U. S. 157, 80 L. E. 555;
Helvering v. *Minnesota Tea Co.*, 296 U. S. 378, 80 L. E. 284;
Burnet v. *Commonwealth Improv. Co.*, 287 U. S. 415, 77 L. E. 399;
Blair v. *Osterlein Mach. Co.*, 275 U. S. 220, 72 L. E. 249;
Duignan v. *United States*, 274 U. S. 195, 200, 71 L. E. 996, 1000.

The reason for the rule is that the opposing party is entitled to know the basis of law and fact upon which the

case is decided, and this Court is entitled to the benefit of a decision below upon the questions presented.

Helvering v. *Wood*, 309 U. S. 344, 84 L. E. 796;
Helvering v. *Texas-Penn Oil Co.*, 300 U. S. 481, 498, 81 L. E. 755, 766.

The practice is founded upon considerations of fairness to the Court and to the parties, and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact.

United States v. *Atkinson*, 297 U. S. 157, 80 L. E. 555.

In the case of *Hormel* v. *Helvering*, 312 U. S. 552, 85 L. E. 1037, the Commissioner, before the Board of Tax Appeals, sought to sustain a deficiency assessment on the authority of sections 166 and 167 of the Revenue Act. On appeal before the Circuit Court of Appeals he abandoned reliance on section 166, still relied on section 167, but for the first time contended that in any event the deficiency was properly assessed under section 22a of the Act.

The Court of Appeals considered the latter claim and sustained the assessment as proper under section 22a, though not authorized under the provisions of sections 166 and 167.

This Court affirmed the decision of the Circuit Court of Appeals, pointing out that the authority of the latter Court to review decisions of the Board of Tax Appeals rests on statutes which provide that the Circuit Courts of Appeals "have power to affirm, or if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require".

This statutory provision was sufficient to take the case out of the general rule. There is nothing in this case to indicate any relaxation of the rule which has been recognized on numerous occasions by this Court.

The instant case presents no exceptional circumstances that would take it outside of the rule.

The fact that the Circuit Court of Appeals denied a petition to rehear, does not entitle petitioner to insist on raising the point here.

Herndon v. *Georgia*, 295 U. S. 441, 443, 79 L. E. 1530, 1522;
McGarrity v. *Delaware River Bridge Com.*, 292 U. S. 19, 78 L. E. 1095;
American Surety Co. v. *Baldwin*, 287 U. S. 156, 163, 77 L. E. 231, 236;
Live Oak Water Users Assn. v. *Railroad Commission*, 269 U. S. 354, 70 L. E. 305.

Petitioner having tried the case upon one theory can not now, in this Court, contest it upon a different theory.

Respectfully submitted,

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